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SUPREME COURT, U. S.
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No. [redacted] 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

R. P. HUNTER, *Petitioner*

vs.

TEXAS ELECTRIC RAILWAY COMPANY, *Respondent*

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD JUDICIAL DISTRICT OF TEXAS AT AUSTIN, TEXAS

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No. 893

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vs.

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BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD JUDICIAL DISTRICT OF TEXAS AT AUSTIN, TEXAS

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Respondent, Texas Electric Railway Company, respectfully shows to the Court that the petition for Writ of Certiorari in this case should be denied, for the reason that the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin,

Texas (R., p. 147), reported in 194 S. W. 2d 281, correctly states the law in the case.

CONCISE STATEMENT OF THE CASE

The Respondent does not believe that the statement of this case made by the Petitioner correctly presents all of the facts in this case. The Respondent does believe that the statement of the facts, as set forth in the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, does set forth correctly, fairly and impartially such facts, and Respondent here adopts that portion of said opinion as its statement of the case. (R. 147, 148, 149, 150 and the first 6 lines of page 151)

THE BASIC QUESTIONS

There are but two Basic Questions involved in this appeal:

1. Can the Petitioner recover any damages for personal injuries sustained by him as a result of a collision between two of the Respondent's interurban cars, which collision was caused by the Petitioner's negligent violation of the company's rules and the time card order?
2. Can the Petitioner recover under the Federal Employers' Liability Act for injuries received by him as the result of a head-on collision between two of the Respondent's interurban cars, when the jury found that his negligence was the sole proximate cause of Petitioner's injuries?

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BASIC QUESTION NO. 1 PRESENTED AND ARGUMENT IN CONNECTION THEREWITH

The Petitioner presents in this Court four specifications of error (petition for Writ of Certiorari, p. 8) claiming that he was denied the right of trial by jury because the Court did not submit for the consideration of the jury the following acts of negligence:

1. Failure of the Respondent to provide an automatic block signal device in the sector of the collision.

2. Failure of the Court to submit to the jury the issue as to whether or not the Respondent negligently employed the system it did for the paasage of traffic in the sector of the collision.

3. The refusal of the Court to submit to the jury whether or not the operator of the South bound motor car failed to properly slow down his car before reaching the point of collision, and whether or not this was negligence.

4. The failure of the Court to submit to the jury the issue whether or not the motorman on the South bound motor car failed to apply his brakes as he approached the point of collision and whether or not this was negligence.

STATEMENT UNDER FIRST BASIC QUESTION

The opinion of the Court of Civil Appeals for the Third Judicial District of Texas, sets forth correctly, fairly and impartially a clear picture of the transaction in question. The same is here adopted. (R., p. 147, 148, 149, 150 and first 6 lines page 151)

AUTHORITIES UNDER FIRST BASIC QUESTION

Unadilla Valley Railway Company vs. Caldine, 73 L. Ed. 224, 278 U. S. 139, 49 Sup. Ct. 91

Southern Railway Company vs. Youngblood, 76 L. Ed. 1124, 286 U. S. 313

Southern Railway Company vs. Dantzler, 76 L. Ed. 1127, 286 U. S. 319

Willis vs. Pennsylvania Railroad Company, 122 Fed. 2d 248 (Writ of Certiorari denied), 86 L. Ed. 547, 62 Sup. Ct. 187

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Bishop vs. Texas & Pacific Railway Company, 62 S. W. 2d. 247

Brady vs. Southern Railway Company, 88 L. Ed. 239, 320 U. S. 476, 64 Sup. Ct. 232

Davis vs. Kennedy, 69 L. Ed. 212, 266 U. S. 147, 45 Sup. Ct. 33

ARGUMENT UNDER FIRST BASIC QUESTION

The facts in this case disclose that R. P. Hunter was an old and trusted employee of the Respondent; that he had worked for it for 31 years as an operator and dispatcher, and in the latter capacity he was an official of the company. He was thoroughly familiar with the rules and regulations of the company, not only from the standpoint of a working employee, but from the standpoint of an official of the company. He was furnished by the company a time card. Upon this time card there were certain positive meets with other cars and, if he failed to obey the instructions of the time card, a collision would result. At the time of this unfortunate occurrence he did overlook the time card. He violated every known instruction and duty that he owed not only to himself and to the Respondent, but to the passengers on his car. *He just did not do that which he was commanded, required and was his duty to do.*

By a long line of decisions in the construction of the Federal Employers' Liability Act, the Courts have held that an employee who violates a positive order and is injured as a result thereof, cannot recover damages under

the Federal Employers' Liability Act. In the case of Unadilla Valley Railway Company vs. Caldine, 73 L. Ed. 224, 278 U. S. 139, 49 Sup. Ct. 91, a lengthy discussion was given by this Court in a case where an employee of the Railway Company violated his positive written orders just as the Petitioner Hunter did in this case. Instead of waiting for the train he was supposed to wait for, he disobeyed the order, the purpose of which was to prevent a collision. He, without any excuses for disobeying it, pulled out on the main line and was killed; and, in passing upon the very point in question, the Court said:

> "It seems to us that Caldine, or one who stands in his shoes, is not entitled as against the railroad company that employed him to say that the collision was due to anyone but himself. He was in command. He expected to be obeyed, and he was obeyed as mechanically as if his pulling the bell had itself started the train. In our opinion he cannot be heard to say that his subordinate ought not to have done what he ordered. He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own acts."

The Petitioner, R. P. Hunter, was the sole operator of the interurban car in question. He was certainly in command, and his own wilful or intentional violation of the rule caused the accident and the resulting injuries to himself. This, in the opinion of the Respondent, is a much stronger case against an employee than was the Caldine case.

In the case of Southern Railway Company vs. Youngblood, 76 L. Ed. 1124, 286 U. S. 313, the positive violation of a written order by a motorman precluded him from a recovery under the Federal Employers' Liability Act. In the case of Southern Railway Company vs. Dantzler, 76 L. Ed. 1127, 286 U. S. 319, the same rule was announced. It might be argued that the 1939 amendment to the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 54, casts aside and overrules these decisions of this Court. However, in the case of Willis vs. Pennsylvania Railroad Company, 122 Fed. 2d. 248 (Writ of Certiorari denied), 62 Sup. Ct. 187, 86 L. Ed. 547, the Court made the following statement:

> "If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his death. In such circumstances his executrix can have no recovery under the Act. Great Northern Ry. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732; Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; Unadilla Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; Blunt v. Pennsylvania R. Co., 6 Cir., 9 F. 2d 395; Unadilla Valley Ry. Co. v. Dibble, 2 Cir., 31 F. 2d 239. The recent amendment, 45 U. S. C. A. Sec. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault.

The Supreme Court of Missouri, in the case of Joice vs. Missouri-Kansas-Texas Railroad Company, 189 S. W. 2d 568, at page 574 makes observation in connection with a

case wherein an employee's injuries were not caused solely by a positive violation of a rule as follows:

> "With respect to proximate cause the case is not comparable to a conductor's proceeding ahead of his train contrary to positive written orders to wait on a side track as was the fact in Unadilla Valley Ry. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224, and Southern Ry. Co. v. Youngblood, 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124."

The Employers' Liability Act of the State of Texas, insofar as the same affects common carriers, as found in Art. 6440, et seq., of the Revised Statutes of Texas, 1925, is similar in many respects to the Federal Employers' Liability Act. It shall not be the purpose of the Respondent to give a detail holding of the various Texas Courts in their construction of the Texas Act, or in their construction of the Federal Employers' Liability Act. However, a review of the authorities herein cited will reveal that the above construction has been given by the Texas Courts to both Acts.

In closing, we invite the Court's attention to the following part of the Petitioner's testimony in the trial Court (R. the last 3 lines on page 63 and the first 4 lines of page 64):

> Q. All right. Now, Mr. Hunter, if you had stopped at Woodlake as the time card and rules required you do, this (referring to the collision) would not have happened?
>
> A. No.

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This clearly demonstrates the position of the Respondent. Hunter's act and his act alone caused the collision.

BASIC QUESTION NO. 2 PRESENTED AND ARGUMENT IN CONNECTION THEREWITH

STATEMENT UNDER SECOND BASIC QUESTION

The trial Court submitted this case to the jury under proper instructions and under proper interrogatories embracing the doctrine of imminent or discovered peril (R. 23, 24, 25 and 26), and propounded to the jury the following interrogatory:

> Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the South bound interurban car upon the occasion in question was the sole proximate cause of his injuries, if any he received? (R. 27)

The jury, in answer to the interrogatories propounded to it, found that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the South bound interurban car on the occasion in question caused him to be in a position of peril as he approached the point of the collision. (R. 28)

The Court, in submitting the doctrine of imminent or discovered peril, submitted the following interrogatory:

> "Do you find from a preponderance of the evidence that the operator of the defendant's South bound interurban car, on the occasion in question, actually dis-

covered the plaintiff's perilous position in time to have averted injury to the plaintiff by the use of all means at his command commensurate with his own safety and the safety of his passengers and the inter-urban car which he was operating?

Answer Yes or No.

Answer: No." (R. 28)

As above stated, the court propounded to the jury the following special interrogatory:

"Do you find from a preponderance of the evidence that the negligence of the plaintiff, R. P. Hunter, in failing to await the arrival of the South bound inter-urban car upon the occasion in question was the sole proximate cause of the injuries, if any he received?

Answer Yes or No.

Answer: Yes." (R. 30)

The Court, with ample instructions in connection therewith, propounded the damage issue as follows:

"What amount of money if paid now in cash will compensate the plaintiff, R. P. Hunter, for the personal injuries, if any, sustained by said plaintiff on the occasion in question?

Answer in Dollars and Cents.

Answer: None." (R. 30)

AUTHORITIES UNDER SECOND BASIC QUESTION

Federal Employers' Liability Act, 45 U. S. C. A., Title 45, Sec. 51, et seq., 10 F. C. A., Title 45, Sec. 51, et seq.

Tiller vs. Atlantic Coast Railroad Company, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444

Tennant vs. Peoria & Pekin Railway Company, 88 L. Ed. 520, 321 U. S. 29, 64 Sup. Ct. 409

Reese vs. Philadelphia Railroad Company, 239 U. S. 463, 60 L. Ed. 384, 36 Sup. Ct. 134

Wheelock vs. Freiwald (C. C. A. 8th) 66 F. 2d 694

Jessionowski vs. Boston & Maine Railroad Company, 91 L. Ed. 355 (Advance Sheet 5)

Brady vs. Southern Railway Company, 88 L. Ed. 239, 320 U. S. 476, 64 Sup. Ct. 232

ARGUMENT UNDER SECOND BASIC QUESTION

The Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, 10 F. C. A., Title 45, Sec. 51, provides that every common carrier by railroad, while engaged in interstate commerce shall be liable in damages to the person suffering such damages, etc., —"resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier." It was, therefore, necessary that R. P. Hunter show to the satisfaction of the jury that his

injuries were caused in whole or in part by the negligence of the railway company, or some of its officers or employees. It was admitted in the trial Court, and is admitted here, by the Petitioner that he was negligent. The jury found that his negligence was the sole proximate cause of his injuries. Therefore, under the terms of the Act itself, the Petitioner, R. P. Hunter, under the jury's finding, is not entitled to recover. It is elementary under the Federal Employers' Liability Act that where the jury finds the injuries resulted solely from the plaintiff's own negligence, he cannot recover. We believe, therefore, that a comprehensive citation of authorities is unnecessary.

In the case of Jessionowski vs. Boston & Main Railroad Company, 91 L. Ed. 355, Advance Sheet No. 5, decided January 13th, 1947, this Court put its stamp of approval on instruction given by the trial Court reading, in part, as follows:

> "Of course, if the deceased's negligence was the sole cause of the accident the plaintiff here cannot recover."

It is argued at length in the Petitioner's brief that he was denied a trial by jury. Nothing could be further from the true facts. He was given a jury trial. The jury found, in substance, that the operator of the South bound motor car, upon discovering the Petitioner's perilous position, used all the means at hand commensurate with his own safety, the safety of his passengers and the motor car he was driving to avoid a collision. The jury found that

the Petitioner's negligence in failing to wait at the Woodlake passing track, as the time card and the rules of the company required him to do, and he himself knew he was supposed to do, was the *sole* proximate cause of his injuries, if any.

The trial Court correctly submitted the issue of damages; in other words, how much had he suffered as the result of the injuries received by him on the occasion in question, and the jury answered none.

In its last analysis, the Petitioner's case was submitted to the jury in keeping with the mandates and decisions of this Court, and the jury found against him.

For this Court to go behind the positive finding of the jury and overthrow the decision of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, would make the Respondent an insurer of the safety of the Petitioner and its other employees. This the Respondent does not believe the Court will do since this Court in the case of Tennant vs. Peoria & Pekin Union Railway Company, 88 L. Ed. 520, 321 U. S. 29, 64 Sup. Ct. 409, quoting therein from Tiller vs. Atlanta Coast Railroad Company, 318 U. S. 54, 87 L. Ed. 610, 63 Sup. Ct. 444, said:

> "In order to recover under the Federal Employers' Liability Act it was incumbent upon the Petitioner to prove that Respondent was negligent and that such

> negligence was the proximate cause in whole or in part of the fatal accident."

In other words, it was Hunter's duty to convince the jury that his negligence was not the sole proximate cause. This he failed to do and the jury not only found that he was solely negligent, but that he was entitled to recover no damages whatsoever.

Quoting from the opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, who had the entire record before them and whose fact findings have never been questioned by the Petitioner in any Court, as follows:

> "There was no proof whatever that the time card system was inadequate, and the evidence showed that if a block system had been installed it would have added nothing to the positive time card instructions and the rules of Appellee, which Appellant violated without cause and which was the sole efficient cause of the collision and his injury." (R. 152)

The jury, by its findings, acquited the fellow employee Maxwell of any negligence. Therefore, the Respondent in this case, under the record, could have been guilty of no negligence.

The Respondent thinks that the rule announced by this Court in the case of Brady vs. Southern Railway Company, 88 L. Ed. 239, 320 U. S. 476, 64 Sup. Ct. 232, as follows:

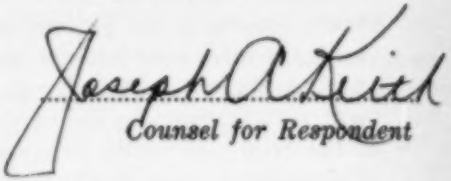
> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

is certainly applicable to this case.

Certainly the Respondent is not the insurer of the safety of its employees, and it has never been the intention of the law to make the Respondent such. The rule is very tersely stated in the case of Wheelock vs. Freiwald (C. C. A. 8th) 66 F. 2d. 694, as follows:

> "(1) The Federal Employers' Liability Act does not make an employer an insurer of the safety of its employees, but to entitle plaintiff to recover the defendants must have been guilty of some act of negligence which was the proximate cause of Freiwald's death. Baltimore & O. R. Co. v. Berry, 286 U.S. 272, 52 S. Ct. 510, 76 L. Ed. 1098; Atchison, T. & S. C. R. Co. v. Toops, 281 U.S. 351, 50 S. Ct. 281, 74 L. Ed. 896; Coyne v. Union Pac. R. Co., 133 U. S. 370, 10 S. Ct. 33 L. Ed. 651; Reese v. Philadelphia & R. R. Co., 239 U. S. 463, 36 S. Ct. 134, 60 L. Ed. 384."

WHEREFORE, the Respondent prays that the petition for Writ of Certiorari in this case be denied.



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